

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP1412

Cir. Ct. No. 2012TP73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO TYLER E., A PERSON UNDER
THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANGIE S.,

RESPONDENT-APPELLANT,

MARK E.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DiMOTTO, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Angie S. appeals the circuit court's order terminating her parental rights to Tyler E. She argues that the circuit court erroneously exercised its discretion when it determined that termination was in Tyler's best interest without adequately considering the harm to Tyler from severing his connection with his biological family, and without adequately considering its power to place protective controls on a guardianship with Julie E., Tyler's paternal grandmother. We disagree and affirm.

BACKGROUND

¶2 Tyler was born to Angie and Mark E. on June 5, 2008.² Tyler and his mother lived with his maternal grandmother, Carrie W., and her significant other, Jim S., much of the first year and a half of his life. During that time, Angie acknowledged that she lived with various friends and relatives, and did not always live with Tyler.

¶3 In October 2009, Shereta Redmond, an initial assessment social worker at the Bureau of Milwaukee Child Welfare (BMCW), received a tip on BMCW's hotline that Tyler was living in a home that was unsafe and that Angie had substance abuse issues. Redmond met with Angie, and while Angie generally denied the allegations, she did admit that she was homeless. Together, Redmond and Angie set up a protective plan, which included an agreement that Tyler was to live with Carrie, his maternal grandmother. The plan also included programs

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12.) All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Mark's parental rights to Tyler were also terminated but are not before us on this appeal.

meant to address concerns about Angie's mental health issues and housing instability, and provided her access to parenting and home management classes. In January 2010, Angie decided to discontinue services because they were voluntary and because she believed Tyler was safe with her mother. Redmond did not initiate any court action.

¶4 By January 2011 it had become evident that court action was necessary due to Angie's struggles with substance abuse, homelessness, untreated mental health issues, and domestic violence between her and Tyler's father Mark. Tyler was taken into protective custody and on January 14, 2011, the State filed a petition alleging that Tyler was a child in need of protection or services (CHIPS). On May 18, 2011, the trial court granted the CHIPS petition and entered a dispositional order formalizing Tyler's placement with Carrie and Jim, where he had informally lived since January 2010.

¶5 In July 2011, Angie told her case manager, Kylee Johnson, that she and Jim (with whom Tyler was living) had been in a physical altercation, and that Jim had given her a black eye. At that same time, Johnson had become concerned that Carrie and Jim were permitting Tyler unsupervised contact with both parents, but she was unable to verify any information that would necessitate seeking to remove Tyler from his maternal grandmother's house. Johnson's last contact with Angie was in July 2011, after which time she had no way to contact Angie.

¶6 The next case manager, Melissa Armstrong, did not hear from Angie until October 2011, despite contacting all known relatives to try to locate Angie when Armstrong was assigned the case in September 2011. Meanwhile, Armstrong instituted a safety plan with Carrie, Jim, and Julie (Tyler's paternal grandmother) in response to concerns that both grandmothers were permitting

Tyler unsupervised visits with his parents. In October 2011, Armstrong also learned that Carrie and Jim, with whom Tyler was still staying, were on the verge of eviction from their residence and they had no place to go with Tyler. This was their third eviction in the past year.

¶7 Armstrong placed Tyler with Julie, with whom he had been spending weekends. Even though Mark, Tyler's father, lived with Julie, the safety plan reiterated that Tyler was to have no unsupervised contact with Mark, and that Mark was not to drive with Tyler.³ Mark openly admitted to having a substance abuse problem, including the use of various drugs, and taking 800 milligrams of Percocet on a daily basis. However, Mark refused to participate in alcohol or other drug treatment programs (AODA). Despite the safety plan and Armstrong's reiteration of that plan to Julie, the day after Tyler had been placed with Julie, Armstrong discovered that Julie had permitted Mark to drive with Tyler in clear violation of the safety plan to which she had agreed. Because all family placements were deemed inappropriate, Tyler was placed in a foster home on October 24, 2011.

¶8 When Angie met with Armstrong on October 31, 2011, Angie stated that she knew her parents (Carrie and Jim) were bad people but at least she knew where Tyler was. Angie informed the case manager that Carrie and Jim were pill addicts, that they were physically abusive to her, and that there had been multiple calls with police involved at their house, one of which ended with a knife being

³ BMCW's safety concerns were well founded. Mark later pled guilty to homicide by negligent operation of a vehicle on February 26, 2013, and was sentenced to four years of initial confinement and three years of extended supervision.

pulled in front of Tyler. Prior to this time, Angie had not relayed any of her concerns about drug use in Carrie and Jim's home to BMCW.

¶9 On March 29, 2012, the State filed a petition to terminate Angie's parental rights to Tyler. As grounds, the petition cited abandonment, continuing-CHIPS, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1)(a)2., (2), & (6).

¶10 Beginning on November 26, 2012, the trial court held a jury trial on the merits of the TPR petition. The jury heard the following testimony.

¶11 Angie had a history of being transient and not having stable or suitable housing. Angie was "diagnosed with bipolar, ADHD, high anxiety, and OCD." She had been prescribed medications and engaged in therapy, but was not doing either at the time of the jury trial. She was also not engaged in any AODA treatment or domestic violence counseling. Angie and Mark were in an on-again, off-again relationship for the past seven years, and had a history of domestic violence between them. Some of these arguments occurred in front of Tyler. Mark was charged and convicted of domestic violence battery in October 2007, while Angie was pregnant with Tyler. Mark bit Angie on the forearm and slammed her head into a car window. Police had been called in response to their arguments more than ten times over the course of their relationship. Their most recent fight was the week prior to the jury trial, and Angie had gone to jail for domestic violence toward Mark in the last couple of months before trial.

¶12 From November 1, 2011, through March 11, 2012, Angie had no face-to-face contact with Tyler, and she did not acknowledge her mental health needs, AODA issues, or domestic violence issues. Consequently, the jury found that Tyler was in continuing need of protection and services, that Angie had

abandoned Tyler, and that Angie had failed to assume parental responsibility for Tyler. The trial court found Angie unfit, and the matter was adjourned for a contested dispositional hearing.

¶13 On March 1 and 4, 2013, the court held the dispositional hearing. Angie argued that her rights to Tyler should not be terminated, but if Tyler could not be returned to her, guardianship should be granted to Tyler's paternal grandmother, Julie.⁴

¶14 Candy D., Tyler's foster mother, testified. She told the court about the bond and love that Tyler shares with her, her husband, and their two adopted children, as well as their extended family members and friends. Tyler also has a half-sister, Isabella E., who is placed with Candy, and Candy testified to the bond that they shared as well.⁵

¶15 Candy also testified that she had maintained contact with her other adoptive children's biological families, and that she believed it was very important to continue contact with Tyler's biological family members so long as the relationship between them was healthy. Candy told the court that she had contact with Carrie, Jim, and Julie, and was willing to have contact with them moving forward. Candy also knew about Tyler's older half-siblings and thought it was beneficial for Tyler to continue to have contact with them as well.

⁴ Although the petition is not part of the record before us on appeal, it appears as though at some time prior to the dispositional hearing Julie, Tyler's paternal grandmother, petitioned the court for a permanent guardianship of Tyler.

⁵ Angie gave birth to Isabella on September 10, 2012, while Tyler was in foster care. Isabella was drug-affected at birth and was immediately removed from Angie's care. Angie's parental rights to Isabella are not before us on appeal.

¶16 The court appointed Renee Genin, a licensed clinical social worker and attachment specialist, to conduct bonding assessments of Tyler with his mother Angie, and with his foster mother Candy. Genin testified that Tyler exhibited an emerging secure attachment to both Candy and her husband, meaning “that he seemed to trust that they would meet his needs, take care of him, keep him safe, and that they were the primary people he should turn to to get his needs met.” Genin further stated that Tyler had a secondary caregiver bond, rather than a parent-child bond, with Angie. Genin testified that Tyler “having permanency in his home ... is critical for him. To know that he’s not going to have to move, that he’s not going to have to leave, that this is his home, and that it’s going to stay that way no matter who he visits.”

¶17 The ongoing case manager Andrea Bauknecht testified that Tyler’s father Mark had been in custody since December 2012, on charges for homicide by intoxicated use of a vehicle. The case manager had a conversation with Mark and Julie, Tyler’s paternal grandmother, about the pending charges, during which Julie minimized the case, and both Mark and Julie denied that Mark had any AODA issues.

¶18 Bauknecht also testified that there had been concern about placing Tyler with Julie in the past because she ignored the safety plan, allowing Mark to have unsupervised contact with Tyler and to drive with Tyler in a car, despite Mark’s uncontrolled AODA issues, lack of a driver’s license, and lack of car insurance. Bauknecht testified that when another ongoing case manager spoke with Julie about not allowing Mark to transport Tyler, Julie told the case manager that Mark was her son and that she could tell whether he was under the influence by looking in his eyes. Julie did not think it was a big deal that she broke the safety plan because Mark and Tyler were just going to the store.

¶19 Bauknecht told the trial court that she did not believe it would be good to grant Julie guardianship of Tyler, citing concerns about Julie's ability to make safe and appropriate decisions for Tyler in the future. She testified that Tyler does not have a significant relationship with Julie and that she would make decisions that would not be in Tyler's best interests or keep him safe.

¶20 For reasons set forth in more detail below, the trial court concluded that terminating Angie's parental rights to Tyler was in Tyler's best interest. The court noted that the testimony demonstrated that Tyler's foster family was likely to adopt him; that while Tyler was too young to express his wishes, he had been separated from his parents since 2010 and the expert had found that Tyler had a strong attachment to his foster family; that while Tyler had a bond with his extended biological family, those family members—particularly his grandparents—appeared blind to the deficits of Tyler's parents and thereby put Tyler in danger; and that Tyler's foster parents appeared likely to continue a relationship with Tyler's extended family so long as that relationship was healthy.

¶21 Consequently, the trial court entered an order terminating Angie's parental rights to Tyler. Angie appeals.

DISCUSSION

¶22 Angie does not contest the trial court's grounds or fitness findings. Rather, her appeal focuses exclusively on whether the trial court appropriately exercised its discretion when determining that termination of her parental rights was in Tyler's best interest. Specifically, Angie argues that the trial court erroneously exercised its discretion when terminating her parental rights because the trial court: (1) failed to properly consider the effect of termination on Tyler's biological family; and (2) did not adequately consider whether Julie, Tyler's

paternal grandmother, was a suitable candidate for guardianship. We affirm the trial court.

A. The trial court considered the proper factors when it determined that termination of Angie’s parental rights was in Tyler’s best interest.

¶23 The ultimate decision of whether to terminate parental rights is a matter of trial court discretion. See *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). When deciding whether to terminate a parent’s parental rights, the trial court must make its findings on the record, consider the standards and factors found in WIS. STAT. § 48.426(3) relating to the child’s best interests, and explain the basis for its disposition. See *Sheboygan Cnty. DHHS v. Julie A.B.*, 2002 WI 95, ¶¶29-30, 255 Wis. 2d 170, 648 N.W.2d 402. A proper exercise of discretion by a trial court in the dispositional phase of a termination of parental rights action requires the trial court to give “adequate consideration of and weight to” each of the factors found in § 48.426(3). See *State v. Margaret H.*, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475. In reviewing a discretionary determination, “we examine the record to determine if the [trial] court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach.” *Brandon Apparel Grp., Inc. v. Pearson Properties, Ltd.*, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544.

¶24 At the dispositional hearing, the trial court must consider the following factors when determining whether a termination is in a child’s best interests:

- (a) The likelihood of the child’s adoption after termination.

(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements.

WIS. STAT. § 48.426(3). The trial court did so here.

¶25 Addressing factor WIS. STAT. § 48.426(3)(a)—the likelihood of the child's adoption after termination—the trial court noted that Tyler's foster mother, Candy, testified that she and her husband were interested in adopting Tyler, that they had adopted other children and were approved for adoption, and that there were no health or age impediments to Tyler's adoption by his foster family. With respect to factors § 48.426(3)(b), (d), and (e)—the age and health of the child, the wishes of the child, and the duration of separation of the parent from the child—the trial court stated that, while Tyler was too young to express his wishes, he had been separated from his parents since 2010, the majority of his life, and that the bonding expert found that Tyler had a strong attachment to his foster family.

¶26 The trial court also addressed factor WIS. STAT. § 48.426(3)(f)—whether termination will result in a more stable and permanent family relationship for the child—finding that Candy and her husband put themselves second to their kids and to Tyler. The court noted that the evidence demonstrated a strong bond

between Tyler and his foster family and that that bond was important in establishing Tyler's sense of security. The trial court emphasized Genin's testimony, reiterating that "in terms of attachment, an adoption is critical" for Tyler.

¶27 Finally, the trial court also addressed WIS. STAT. § 48.426(3)(c)—Tyler's relationship with his biological family and the effect that termination of the relationship would have on Tyler. In doing so, the court stated:

I have no doubt that Carrie W[.], Jim S[.], [and] Julie E[.] love Tyler. I have no doubt about that at all. But they also have shown a lack of recognition of the issues in Ms. S[.]'s life and the issues in Mr. E[.]'s life. They are blind to their severe deficits as they pertain to Tyler. Ms. E[.] let the father drive Tyler when he doesn't have a license and, of course, as we know of course after the fact, driving is an issue.

The court went on to state:

Now, does Tyler have a substantial relationship with his mother? He has a relationship, but it's more of a relationship of a friend than a parent. Actually, Tyler has a more substantial relationship with his grandmother, Ms. W[.]

....

So the issue is will it be harmful to legally sever the relationship of Tyler with his mother, his father, and his grandparents? I find it will not be harmful to sever the legal relationship because the de facto relationship, I am satisfied, will continue. And the reason why I'm satisfied it will continue is because [the foster mother] has allowed two children she's adopted to continue to have a relationship with their birth family, which history has established that.

¶28 Ultimately, the trial court found, after considering all of the factors in WIS. STAT. § 48.426(3), that all of the factors supported TPR and adoption as being in Tyler's best interest. The court concluded:

[T]he court has to consider ... what's in Tyler's best interests. He is in a great home. He is being put first. He is being given 24-7 attention. And above and beyond that, [his foster parents] are going to allow a continued relationship with the grandparents, with the mother, and with the father. In that regard, it's a triple win for Tyler.

As such, the trial court properly considered all of the factors when determining that termination of Angie's parental rights was in Tyler's best interest.

¶29 In so holding, we disagree with Angie's contention on appeal that the trial court failed to "evaluate the effect of the legal severance on the biological family" or that the trial court's decision fails to comply with our supreme court's decision in *Margaret H.*

¶30 First, Angie misstates the law when she contends that the trial court was required to "evaluate the effect of the legal severance on the biological family." The paramount concern at the dispositional stage of a TPR proceeding is the best interests of the child, not those of the child's biological family. *Julie A.B.*, 255 Wis. 2d 170, ¶37. To the extent that Angie means to argue that the trial court did not adequately consider whether Tyler had a substantial relationship with his biological family or whether it would be harmful to sever that relationship, we disagree. As we set forth above, the court did consider those relationships but ultimately determined, based on all the factors set forth in WIS. STAT. § 48.426(3), that termination of Angie's parental rights was in Tyler's best interests.

¶31 Second, contrary to Angie's allegations, the trial court's decision comports with the dictates of *Margaret H.* In *Margaret H.*, our supreme court stated that termination of parental rights results in severance of the legal relationship with all biological family members, and that consequently, WIS. STAT. § 48.426(3)(c) unambiguously requires "that a [trial] court evaluate the

effect of a legal severance on the broader relationships existing between a child and the child's birth family.” *Margaret H.*, 234 Wis. 2d 606, ¶21. The court noted that “[t]hese relationships encompass emotional and psychological bonds fostered between the child and the family.” *Id.* The trial court also explicitly stated, however, that as part of the examination of the impact of a legal severance on the broader relationships existing between a child and his or her family, the trial court, in its discretion, “may afford due weight to an adoptive parent’s stated intent to continue visitation with family members.” *See id.*, ¶29. That is what the trial court did here.

¶32 Here, while the trial court acknowledged Tyler’s substantial relationship with his grandparents, it also noted that his grandparents were sometimes blind to Tyler’s needs as they related to his parents. The trial court considered Candy’s belief that she would continue to allow Tyler to see his grandparents, as the trial court was permitted to do by *Margaret H.* *See id.* Taking into consideration all of the factors, including the effect of legal severance of the relationship with his biological family, the trial court determined that termination was in Tyler’s best interest.

¶33 Angie argues that the trial court erred when it found that it would not be harmful to sever the legal relationship between Tyler and his grandparents. Angie believes that the evidence demonstrated that Tyler had a substantial relationship with his grandparents and that the trial court improperly relied on Candy’s statements that she would permit Tyler to continue visiting with his grandparents without considering the loss of legal rights by his biological family, in violation of the holding in *Margaret H.*

¶34 Angie’s argument is no more than a disagreement with how the trial court exercised its discretion. She believes that the evidence demonstrates that Tyler had substantial relationships with his grandparents, such that those relationships alone mandate a finding that termination of Angie’s parental rights is not in Tyler’s best interest. But this is exactly the argument our supreme court rejected in *Margaret H.* See *id.*, ¶35 (“exclusive focus on any one factor is inconsistent with the plain language of WIS. STAT. § 48.426(3)”). Furthermore, *Margaret H.* permitted the trial court to consider Candy’s statement that she would continue to permit Tyler to have a relationship with his grandparents so long as that relationship remained a healthy one. See *id.*, 234 Wis. 2d 606, ¶29. Here, the trial court carefully considered each of the factors set forth in § 48.426(3), including the effect termination would have on his relationships with his grandparents, and determined that, despite any relationship he had with his grandparents, it was in Tyler’s best interests to terminate Angie’s rights. As such, we must affirm.

B. The trial court did not erroneously exercise its discretion when it determined that termination of parental rights was preferable over a guardianship.

¶35 Angie also argues that the trial court erroneously exercised its discretion when it rejected Angie’s alternative proposal that Julie, Tyler’s paternal grandmother, be appointed Tyler’s guardian. A guardianship is an option open to the court at disposition pursuant to the WIS. STAT. § 48.427.

In denying the guardianship, the trial court stated:

As the guardian [Ms. E.] would make all the decisions. She, of course, would have to let her son in and would have to let Ms. S[.] have a relationship with Tyler, visit with Tyler. But Ms. E[.] can be fully aware of all of the mother’s problems and if the father had DV problems he didn’t address when he got out of prison, AODA issues that

weren't addressed, can still let the visits be unsupervised, can do whatever she wants because that's her choice.

... Ms. E[.], some of the decisions may [sic] made vis-à-vis her son, don't give this Court any confidence that Tyler would be safe under a guardianship with [her].

I have no concern that Ms. E[.] would hurt Tyler But I have no assurance that Tyler would be safe around his mother or his father because of the lack of attention to safety plans in the past. It's the lack of safe decision making that concerns me and I have no reason to believe that it won't be a problem in the future.

....

I don't dispute the fact that Julie E[.] has a stable home, that there's a school nearby, that she's financially able to take care of Tyler, but as a guardian, she and she alone would make decisions: When and under what circumstances Mr. E[.], when he's out of prison, and Ms. S[.] can have Tyler.

....

Safety and stability have been issues with ... Ms. E[.] vis-à-vis Tyler and the guardianship is not in Tyler's best interests.

¶36 Angie argues that the trial court did not properly consider “its ability to mold a guardianship to fit” the trial court’s concerns about Julie. We fail to see how this is so. The trial court’s overarching concern with granting Julie any sort of guardianship was her ability to keep Tyler safe. The court was not convinced she could do so based on her history. Furthermore, when determining that termination, rather than some sort of guardianship, was in Tyler’s best interest the trial court was concerned with Tyler’s need for permanence and security. The trial court repeatedly relied on Genin’s testimony, noting that Tyler needed a “sense of security” and that “in terms of attachment, an adoption is critical” for Tyler. A guardianship of any variety would not have given Tyler the permanence the trial court believed the evidence demonstrated that Tyler needed.

¶37 Angie also complains that the trial court “over-generalized from the driving incident, finding that Julie ... [was] blind to Tyler’s needs.” Angie’s argument amounts to nothing more than a disagreement with the trial court over how it exercised its discretion. The trial court viewed the driving incident as an extreme example of Julie’s inability to see Mark’s faults as a parent and how those faults place Tyler at risk, and the trial court recognized that while Mark was currently incarcerated, he would be released within a few years. It was within the trial court’s discretion to place great weight on that incident. Looking at all of the factors set forth in WIS. STAT. § 48.426(3), the trial court properly determined that Tyler would benefit from the stability that adoption would provide and that a guardianship was not in his best interests. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

